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IN THE

United States Supreme Court

GREG RUGGIERO,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 632(a)(1)(B) of the Radio Broadcasting Preservation Act of 2000, Pub. L. No. 106-553, § 632(a)(1)(B), 114 Stat. 2762, automatically and permanently disqualifies all former unlicensed "microbroadcasters" from applying for low power FM radio ("LPFM") licenses or becoming parties to LPFM license applications.

1. Whether Section 632(a)(1)(B) is subject to intermediate scrutiny under the First Amendment and Equal Protection guarantee of the Fifth Amendment, given that the statute (a) bars future constitutionally protected speech (including core political expression) over the broadcast medium, (b) singles out a small segment of the press for an especially harsh sanction, and (c) diminishes diversity of information over the broadcast medium by disqualifying individuals and groups who might become vital sources of local radio programming.

2. Whether Section 632(a)(1)(B) can survive intermediate scrutiny, given that (a) there exists a readily available, equally effective, less-burdensome alternative, (b) the statute leaves civil wrongdoers, felons, and regulatory violators other than unlicensed microbroadcasters eligible for low power and full power broadcast licenses, even though their misconduct raises the same character concerns as does unlicensed microbroadcasting, and (c) the statute covers many circumstances only marginally related to the government interest in ensuring compliance with broadcast laws and regulations.

LIST OF PARTIES

The parties before this Court are petitioner Greg Ruggiero and respondents Federal Communications Commission and United States of America. Petitioner in this Court was the petitioner in action no. 00-1100 in the court below. Respondents here were the respondents in action no. 00-1100 in the court below.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

No. __-____

GREG RUGGIERO,

Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Greg Ruggiero respectfully petitions this Court to issue a writ of certiorari to review the January 31, 2003 judgment of the United States Court of Appeals for the District of Columbia Circuit sitting en banc, sustaining Section 632(a)(1)(B) of the Radio Broadcasting Preservation Act of 2000, Pub. L. No. 106-553, § 632(a)(1)(B), 114 Stat. 2762, and the Federal Communications Commission's implementing regulations.

OPINIONS BELOW

The en banc decision of the United States Court of Appeals for the District of Columbia Circuit (App. 3a) is reported at 317 F.3d 239. The en banc order vacating the panel decision (App. 50a) is unreported. The panel decision (App. 52a) is reported at 278 F.3d 1323.

JURISDICTION

The court of appeals issued its en banc decision on January 31, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

The Radio Broadcasting Preservation Act of 2000 ("RBPA"), Pub. L. No. 106-553, 114 Stat. 2762, is reproduced in the Appendix at 76a. Relevant provisions of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.*, are reproduced in the Appendix at 79a.

The Federal Communications Commission ("FCC") implemented the RBPA in *Creation of Low Power Radio Serv.* (*Second Report and Order*), 16 F.C.C. Rcd. 8026

(2001), relevant excerpts of which are reproduced in the Appendix at 83a. Relevant excerpts from the FCC's earlier statements in the same rulemaking proceeding (MM Dkt. No. 99-25) are reproduced in the Appendix at 89a, 99a, and 112a.

STATEMENT OF THE CASE

Congress has retroactively targeted a narrowly circumscribed class of speakers—former unlicensed low power FM radio broadcasters—for an especially harsh sanction: automatic and permanent disqualification from holding low power FM radio broadcast licenses—the only broadcast licenses practically available to them. This draconian sanction is unprecedented. Until now, no one has ever been subject to an automatic lifetime bar from broadcasting because of prior misconduct, no matter how serious. Rather, every broadcast license applicant—including every civil wrongdoer, felon, and inveterate regulatory violator—has been given an opportunity to show that he or she can operate a broadcast station in the public interest despite past misconduct—misconduct often far more serious than the misconduct at issue here.

During the 1990's, hundreds of unlicensed "microradio" stations began broadcasting in communities all across the United States in an attempt to offset the sharp decline in local programming on licensed commercial and noncommercial radio stations—a decline brought about by, among other things, the massive consolidation of radio station ownership. Communities came to rely on unlicensed "microbroadcasters"—the alternative broadcast press—to bring them news, commentary, and debate on local issues

of public importance—issues that were not addressed elsewhere on the radio dial.

Many unlicensed microbroadcasters took to the airwaves as an act of civil disobedience to prod the Federal Communications Commission ("FCC") to repeal its longstanding ban on low power FM broadcasting—a ban that also contributed to the decline of local radio programming in the United States. Most caused no signal interference. Nonetheless, Congress has automatically and permanently barred all former unlicensed microbroadcasters from holding low power FM radio licenses, even those who only briefly or long ago engaged in unlicensed broadcast operations and those who have become model citizens since ceasing unlicensed broadcast operations.

The sanction imposed on former unlicensed microbroadcasters is analogous to a municipality's decision—in response to peaceful civil disobedience protesting unduly restrictive permit policies for parades in public parks—to automatically and permanently bar the participants in that civil disobedience from receiving any future permits to hold parades in those parks. This Court has made clear that a permanent ban on access to a public forum based on past misconduct cannot survive First Amendment scrutiny. *Kunz v. New York*, 340 U.S. 290, 294-95 (1951).

By targeting former unlicensed microbroadcasters for the sanction of automatic and permanent disqualification from holding low power FM radio licenses, Congress has strayed far afield from this country's commitment to First Amendment freedoms. Petitioner respectfully requests that this Court grant certiorari to address this unprecedented sanction.

Regulatory Background and Procedural History

1. Any person seeking to operate a broadcast station must apply to the FCC for a broadcast license. 47 U.S.C. § 301. Each broadcast license applicant must meet the "character" qualifications prescribed by the FCC. 47 U.S.C. § 308(b). The FCC has long regarded "truthfulness" and "reliability" as the character traits most relevant to broadcast licensing. *Policy Regarding Character Qualifications in Broad. Licensing*, 102 F.C.C. 2d 1179, 1209 (1986), *recon. granted in part and denied in part*, 1 F.C.C. Rcd. 421 (1986) ("*Character Policy Statement*"). In assessing a broadcast license applicant's character, the FCC thus has focused on "the likelihood that [the] applicant will deal truthfully with the [FCC] and comply with the Communications Act and [broadcast] rules and regulations." *Id.* at 1183.

Recognizing that "there is no simple formula for predicting future conduct in every case," *id.* at 1225, the FCC, consistently throughout its regulatory history, has considered broadcast license applicants' prior misconduct on a case-by-case basis, affording even applicants who have engaged in "the most atrocious [FCC] infractions," *Weiner Broad. Co.*, 7 F.C.C. Rcd. 832, 834 (Rev. Bd. 1992), an opportunity to show that they can reliably operate broadcast stations in the public interest despite past misconduct. *Character Policy Statement*, 102 F.C.C. 2d at 1225-29.

Moreover, because of "[t]he inherent inequity and practical difficulty involved in requiring applicants to respond to allegations" of events in the distant past, the FCC long has disregarded misconduct over 10 years old, even when it involved "flagrant disregard of the [FCC's] regulations

and policies." *Id.* at 1229. Further, mindful that even the most inveterate regulatory violators can mend their ways, the FCC has always deemed rehabilitation to be a "significant" factor in assessing a broadcast license applicant's character qualifications.[1] *Id.* at 1228.

The FCC thus gave Allen Weiner "ample opportunity to present mitigating evidence" in support of his broadcast license application, even though Weiner had operated multiple unlicensed radio stations, flouted a court injunction, and misrepresented his true intentions in prior broadcast license applications. *Weiner Broad. Co.*, 6 F.C.C. Rcd. 4337, 4338-43, 4345 n.9 (1991), *aff'd*, 7 F.C.C. Rcd. 832 (Rev. Bd. 1992). And, while it eventually denied Weiner's application, the FCC stipulated that: "[s]hould a 'decent interval' ensue without notable delict, Weiner is not estopped from applying again." *Weiner Broad. Co.*, 7 F.C.C. Rcd. at 834.

Similarly, the FCC permitted L.D.S. Enterprises, Inc. to argue that its principal stockholder had been rehabilitated, even though five years earlier, the FCC had revoked that stockholder's broadcast licenses "for perhaps the most amoral skein of detected villainy in domestic broadcast history," *Weiner Broad. Co.*, 7 F.C.C. Rcd. at 834, involving: (i) deliberate newscast distortions to favor certain

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[1] The FCC has relied on these character qualification policies not only to ensure the selection of truthful and reliable broadcast licensees but also to deter future violations of broadcast laws and regulations. *Character Policy Statement*, 102 F.C.C. 2d at 1228. In that regard, the FCC has observed that the loss of *one* broadcast license (as opposed to total disqualification from holding broadcast licenses) "will likely serve to deter all but the most unrepentant from serious future misconduct." *Id.*

Senatorial candidates; (ii) illegal campaign contributions and bribery of public officials; and (iii) attempted eavesdropping on and intimidation of FCC witnesses.[2] *L.D.S. Enterprises, Inc.*, 86 F.C.C. 2d 283, 284 (1981).

2. The FCC authorized regular FM radio broadcasting in 1941, setting aside channels for noncommercial educational ("NCE") stations. Robert J. Blakely, *To Serve the Public Interest: Educ. Broad. in the United States* 77 (1979). Seven years later, in 1948, seeking more rapid growth of NCE stations, the FCC authorized "Class D" (10-watt) stations. Carnegie Comm'n on Pub. Broad., *A Public Trust* 187 (1979). By the early 1970's, they comprised about one-half of all NCE stations. *Educational FM Radio—The Failure of Reform*, 34 Fed. Comm. L.J. 431, 436 (1982).

In the late 1970's, the FCC largely ceased licensing Class D stations. *Changes in the Rules Relating to Noncommercial Educ. FM Broad. Stations*, 69 F.C.C. 2d 240, 248 (1978), *modified*, 70 F.C.C. 2d 972 (1979). While recognizing that such stations "respond[ed] to discrete local needs," the FCC decided that higher powered stations promoted more "efficient channel usage." *Id.* Though grand-

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[2] Applying the FCC's traditional character qualification policies for broadcast licensees, an FCC Administrative Law Judge recently recommended renewal of notorious convicted computer hacker Kevin Mitnick's amateur radio license. *Kevin David Mitnick (Initial Decision)*, FCC 02D-02 (Released Dec. 23, 2002). *See also Contemporary Media, Inc. v. FCC*, 214 F.3d 187, 194 (D.C. Cir. 2000), *cert. denied*, 532 U.S. 920 (2001) (noting that FCC considered broadcaster's proffer of "mitigating circumstances" to show that it could reliably operate broadcast stations in public interest even though its principal had 12 recent felony convictions for sexual assault on children and broadcaster deliberately concealed its principal's continued involvement in daily broadcast operations).

fathering a number of Class D stations, the FCC licensed only two new Class D stations—in remote communities—after 1978. *Grid Radio v. FCC*, 278 F.3d 1314, 1319-20 (D.C. Cir.), *cert. denied*, 123 S. Ct. 82 (2002).

A decade later, individuals and groups in communities across the United States began operating unlicensed low power FM—"microradio"—stations, broadcasting local news, educational, and cultural programs of interest to listeners in their limited coverage areas. Many of these unlicensed "microbroadcasters" operated in open defiance of the FCC's ban on low power FM radio stations, engaging in civil disobedience to compel a seemingly intransigent FCC to rescind the ban.[3]

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[3] Though violating the broadcast license requirement, almost all unlicensed microbroadcasters sought to avoid causing interference to licensed broadcast and non-broadcast stations. Prior to launching his unlicensed microradio station, for example, Rick Strawcutter retained an engineering firm to find a frequency over which he could broadcast without disrupting other stations' signals. *United States v. Any and All Radio Station Transmission Equip.*, 19 F. Supp. 2d 738, 740 n.4 (E.D. Mich. 1998), *rev'd*, 204 F.3d 658 (6th Cir. 2000). Upon learning that a Toledo translator station had complained of interference from his broadcasts—a complaint that the FCC found unsubstantiated (*id.* at 740 & n.3)—Strawcutter shut down until he could install a directional antenna to preclude any possibility of interference. *Id.* at 741.

True, the FCC has cited three instances in which unlicensed microradio stations interfered with air-to-ground communications. *Creation of Low Power Radio Serv. (Notice of Proposed Rulemaking)*, 14 F.C.C. Rcd. 2471, 2497, ¶65 (1999). Two, however, involved stations that evidently chose to broadcast on frequencies reserved for air traffic control. FCC, *News Release* Rep. No. CI 97-12 (Oct. 24, 1997). Almost all unlicensed microradio stations, by contrast, operated in the FM band to ensure reception of their broadcasts over ordinary FM radios.

The FCC held to its ban on low power FM radio stations through the 1990's. Prodded by the established broadcast industry, it cracked down on unlicensed microbroadcasters, ordering them to shut down and taking legal action against those who refused to do so. *See, e.g., Free Speech ex rel. Ruggiero v. Reno*, 200 F.3d 63 (2d Cir. 1999); *Prayze FM v. FCC*, 214 F.3d 245 (2d Cir. 2000).

In January 1999, however, the FCC decided to reconsider its low power FM radio ban. Citing intense public interest in community radio, the FCC proposed the creation of a low power FM radio ("LPFM") service. *Creation of A Low Power Radio Serv.* (*Notice of Proposed Rulemaking*), 14 F.C.C. Rcd. 2471, 2476, ¶1 (1999). App. 92a. A year later, in January 2000, the FCC authorized LPFM service. *Creation of Low Power Radio Serv.* (*Report and Order*), 15 F.C.C. Rcd. 2205, 2006, ¶1 (2000) ("*Low Power Report and Order*"). App. 99a. To meet the critical need for "programming responsive to local community needs and interests," the FCC decreed that LPFM stations were to be operated on a noncommercial basis by nonprofit or governmental entities. *Id.* at 2213, ¶17. App. 100a.

In establishing the parameters for the new LPFM service, however, the FCC adopted an extremely broad rule limiting those who could apply for an LPFM license. Concluding that anyone who failed to comply with FCC orders to cease unlicensed broadcast operations lacked the ability "to deal truthfully with the [FCC] and to comply with [its] rules and policies," the FCC decided to accept LPFM license applications from unlicensed microbroadcasters *only* if they could certify (under penalty of perjury) that they shut down their stations within 24 hours of being ordered to do so or by February 26, 1999, whichever

occurred earlier. *Id.* at 2226, ¶54. App. 109a. The FCC extended that requirement to *every* party to an LPFM license application, including the applicant's officers and directors. *Id.* at 2224, 2226, ¶¶49, 54. App. 110a.

In automatically and permanently disqualifying unlicensed microbroadcasters who did not timely shut down their stations, the FCC purported "to apply the same character qualification requirements to [LPFM] licensees as we currently do to full power licenses," *Low Power Report and Order*, 15 F.C.C. 2d at 2226, ¶53 (App. 103a), though under its traditional character qualification policies for broadcast licensees, the FCC has *never* automatically and permanently disqualified a full power broadcast license applicant for past misconduct, no matter how serious. (*See* pp. 4-6 *supra*.)

Because petitioner was involved with an unlicensed microradio station that, as an act of civil disobedience, defied the FCC's orders to shut down, *Free Speech ex rel. Ruggiero v. FCC*, 1999 WL 147743 (S.D.N.Y.), *aff'd*, 200 F.3d 63 (2d Cir. 1999), he was automatically and permanently disqualified by the FCC's LPFM rules from joining in an LPFM license application.

3. Petitioner petitioned the Court of Appeals for the Second Circuit for review of the FCC's Low Power Report and Order, contending that the automatic and permanent disqualification of unlicensed microbroadcasters who did not timely shut down their stations violated his First Amendment rights. The petition was transferred to the Court of Appeals for the District of Columbia Circuit. Oral argument was held on November 28, 2000.

Three weeks later, Congress enacted the RBPA. App. 76a. Besides sharply limiting the number of LPFM licenses (by requiring minimum distance separations between new LPFM stations and full power FM radio stations on third adjacent channels), *id.*, § 632(a)(1)(A), the RBPA directed the FCC to "prohibit any applicant from obtaining [an LPFM] license if the applicant has engaged in any manner in the unlicensed operation of any station in violation of [47 U.S.C. § 301]." *Id.*, § 632(a)(1)(B) ("Section 632(a)(1)(B)"). The RBPA further barred the FCC from granting waivers of this prohibition. *Id.*, § 632(a)(2)(B).

Aside from a few brief remarks by the RBPA's sponsors, Congress did not debate the need for Section 632(a)(1)(B). The sole legislative hearing focused almost exclusively on the established broadcast industry's claim that LPFM stations would cause harmful interference to full power FM radio stations. *FCC's Low-Power FM: A Review of the FCC's Spectrum Management Responsibilities*, Hearing on H.R. 3439 before Subcomm. on Telecomm., Trade, and Consumer Protection of House Comm. on Com., 106th Cong., 2d Sess. (2000). The only legislative finding on Section 632(a)(1)(B) simply states that "the operation of an unlicensed station demonstrates a lack of commitment to follow the basic rules and regulations which are essential to having a broadcast service that serves the public," H.R. Rep. No. 106-567, 106th Cong., at 8 (2000), leaving unclear why that misconduct, alone among all forms of misconduct, warrants automatic and permanent disqualification from holding a broadcast license. There is no mention in the RBPA's legislative history of the FCC's traditional character qualification policies for broadcast licensees, even though the FCC has long and consistently

relied on those policies to weed out applicants who lack a commitment to follow broadcast rules and regulations and deter future broadcast-related violations. (*See* pp. 3-4 & n.1 *supra*.)

Following the RBPA's enactment, the court of appeals remanded the record to the FCC, directing the parties to file briefs addressing the constitutionality of Section 632(a)(1)(B) after the FCC issued implementing regulations. The FCC amended its LPFM rules to automatically and permanently disqualify all unlicensed microbroadcasters from holding LPFM licenses, even those who timely shut down their stations. *Creation of Low Power Radio Serv.* (*Second Report and Order*), 16 F.C.C. Rcd. 8026, 8030, ¶11 (2001). App. 85a.

On February 8, 2002, a divided panel struck Section 632(a)(1)(B) down on First and Fifth Amendment grounds. Writing for the majority, Judge Tatel held that the statute was subject to "appreciably more" than minimal scrutiny. App. 66a. Applying a heightened rational basis standard, Judge Tatel found Section 632(a)(1)(B) fatally under- and over-inclusive relative to the purpose of ensuring compliance with broadcast laws and regulations. On the one hand, the statute left "civil wrongdoers, felons, and even inveterate regulatory violators other than [unlicensed microbroadcasters]" free to apply for LPFM licenses. App. 67a. On the other hand, the statute covered many "circumstances only marginally related to the purpose of increasing regulatory compliance," disqualifying, among others, applicants who only briefly or long ago engaged in unlicensed broadcast operations. App. 69a.

On May 2, 2002, the court of appeals vacated the panel opinion and granted rehearing en banc. App. 50a. On Jan-

uary 31, 2003, the en banc court, by a 7-to-1 vote, sustained Section 632(a)(1)(B) against petitioner's First Amendment and Equal Protection challenges. App. 3a-49a.

4. Writing for the majority, Chief Judge Ginsburg rejected both the "narrow tailoring" standard urged by petitioner and the "rational basis" standard urged by the FCC. App. 3a-24a. Applying an undefined "middle ground" standard of review, the Chief Judge held that Section 632(a)(1)(B) was "reasonably tailored" to serve the government interest in ensuring compliance with broadcast laws and regulations. App. 13a.

While acknowledging that "malefactors" other than unlicensed microbroadcasters remained free, despite their past misconduct, to apply for LPFM licenses, Chief Judge Ginsburg found Section 632(a)(1)(B) not impermissibly underinclusive. App. 14a-16a. Even though Section 632(a)(1)(B) automatically and permanently disqualified individuals who only briefly or long ago engaged in unlicensed broadcast operations, the Chief Judge found the statute not impermissibly overinclusive. App. 16a. Summing up, the Chief Judge declared that there was a "reasonable fit" between Section 632(a)(1)(B) and the government interests in deterring unlicensed broadcasting and preventing future broadcast-related violations.[4] App. 18a.

Judges Randolph and Rogers concurred in separate opinions. Finding no possibility that Section 632(a)(1)(B) would chill third parties from exercising their First

[4] Chief Judge Ginsburg rejected petitioner's Equal Protection claim for the very same reasons that the Chief Judge rejected petitioner's First Amendment claim. App. 17a-18a.

Amendment rights, Judge Randolph concluded that petitioner lacked standing to make a facial overbreadth challenge. App. 23a. Finding the exemptions content-neutral, Judge Randolph concluded that the statute was not impermissibly underinclusive. App. 24a. Judge Rogers agreed that petitioner lacked standing to make a facial overbreadth challenge, though she also observed that a proper party asserting an overbreadth challenge could make "a strong case." App. 28a.

In his dissenting opinion, Judge Tatel criticized the majority for "gloss[ing] over [Section 632(a)(1)B)'s] unusual harshness": "No other violations of the Communications Act or broadcasting regulations result in automatic disqualification nor are punishable by this broadcasting equivalent of the death penalty." App. 30a. "Not only is [the statute] an unusually harsh broadcasting regulation," Judge Tatel wrote, "but automatic lifetime bans appear rarely in American law." App. 31a. Judge Tatel further noted that none involved restrictions on speech. App. 31a.

Judge Tatel expressed "two concerns" with the majority's analysis. First, he observed, the First Amendment values at stake were substantially weightier than the majority suggested because Section 632(a)(1)(B) bars future constitutionally protected broadcast speech, impairs listeners' right to diverse programming, and singles out a well-defined, limited class of speakers for an unusually harsh sanction. App. 32a-34a. Second, Judge Tatel noted, while purporting to apply more than minimal scrutiny, the majority, in effect, applied a rational basis standard, treating Section 632(a)(1)(B) as presumptively valid and disre-

garding the many ways in which it was poorly tailored. App. 35a-42a.

Applying "more than" minimal scrutiny, Judge Tatel concluded that Section 632(a)(1)(B) was "poorly aimed" at ensuring truthful and reliable LPFM licensees and preventing future broadcast-related violations. App. 42a. As in his panel opinion, Judge Tatel found the statute impermissibly under- and over-inclusive. App. 35a-42a.

Addressing the majority's claim that there was a "reasonable fit" between Section 632(a)(1)(B) and the asserted government interests (App. 40a), Judge Tatel asked: "Even given the many violations that occurred during the movement to end the low power ban, what is it about unlicensed microbroadcasters, alone among applicants who have committed offenses, that requires a broadcasting 'mark of Cain' to deter future offenses?" App. 40a.

Finally, Judge Tatel took issue with Judge Randolph's standing analysis. He noted that, contrary to Judge Randolph's assumption, petitioner argued that Section 632(a)(1)(B) could not be constitutionally applied to anyone, including petitioner. App. 46a. Judge Tatel further asserted that petitioner had standing to make a facial overbreadth challenge, given the statute's "classic chilling effect" on third parties. App. 47a.

REASONS FOR GRANTING THE WRIT

This petition should be granted because the decision below—upholding an unprecedented sanction that seriously undermines important First Amendment values—directly conflicts with this Court's First Amendment and Equal Protection jurisprudence.

Without debating less-burdensome alternatives, Congress has automatically and permanently disqualifying former unlicensed microbroadcasters from holding LPFM licenses—the only broadcast licenses practicably available to them—despite the absence of any record evidence that such a draconian sanction is necessary to ensure the selection of truthful and reliable LPFM licensees or deter future unlicensed broadcasting. While automatically and permanently disqualifying even former unlicensed microbroadcasters who only briefly or long ago engaged in unlicensed broadcast operations or who have become model citizens since ceasing their unlicensed broadcast operations, Congress has left civil wrongdoers, felons, and inveterate regulatory violators other than unlicensed microbroadcasters eligible for such licenses.

The court of appeals, in effect, applied minimal scrutiny to Section 632(a)(1)(B), treating the statute as presumptively constitutional, ignoring the ready availability of an equally effective, less-burdensome alternative, and brushing aside the statute's remarkable under- and over-inclusiveness. This was clear error.

While "permitt[ing] more intrusive regulation of broadcast speakers than of speakers in other media," *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994), this Court has consistently applied intermediate scrutiny to "non-structural" broadcast regulations, including broadcast regulations of mere commercial speech.[5] *See, e.g.*,

[5] "Structural" regulations "employ antitrust concepts, limitations on cross-ownership, and the like to ensure diversity in broadcasting while minimizing government attention to broadcast content." *Leflore Broad. Co. v. FCC*, 636 F.2d 454, 458 n.26 (1980). The court of appeals correctly held that Section 632(a)(1)(B) did not fall in this cat-

FCC v. League of Women Voters of Cal., 468 U.S. 364, 399 (1984) (invalidating ban on editorializing by federally-funded NCE stations because statute was "not narrowly tailored to address any of the Government's suggested goals"); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188 (1999) (striking down ban on broadcast advertising of private casino gambling in Louisiana, where casino gambling was legal, in part because ban lacked "narrow tailoring" to serve Government's stated aims); *United States v. Edge Broad. Co.*, 509 U.S. 418, 429-31 (1993) (upholding ban on broadcast advertising of lottery information in non-lottery states *after* finding ban narrowly tailored to serve Government's asserted interests).

Section 632(a)(1)(B) too warrants intermediate scrutiny, given the important First Amendment values at stake. First, the statute bars future constitutionally protected broadcast speech (including core political expression) ostensibly to prevent future violations of broadcast laws and regulations. This Court has made clear that "broad prophylactic" rules "in the area of free expression" are "suspect." *Edenfeld v. Fane*, 507 U.S. 761, 776, 777 (1993) (quoting *NAACP v. Buttons*, 371 U.S. 415, 438 (1963)).

Second, Section 632(a)(1)(B) "single[s] out" a small segment of the press (unlicensed microbroadcasters) "for special treatment." *Turner Broad. Sys.*, 512 U.S. at 640. Because such laws "'pose a particular danger of abuse by

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egory. App. 12a. Indeed, by disqualifying many individuals and groups who seek to become new sources of local radio programming, Section 632(a)(1)(B) lessens, rather than promotes, diversity in broadcasting.

the State,' [they] are always subject to at least some degree of heightened First Amendment scrutiny." *Id.* at 640-41 (quoting *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987)).

Third, Section 632(a)(1)(B) debars hundreds, if not thousands, of individuals and groups who, while on the air (without licenses), became vital sources of local news, music, educational programs and commentary. The statute thus potentially impairs listeners' "paramount" First Amendment right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

We now show that Section 632(a)(1)(B) cannot survive intermediate scrutiny.

I.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS HOLDING THAT THE AVAILABILITY OF LESS-BURDENSOME ALTERNATIVES IS A RELEVANT CONSIDERATION UNDER INTERMEDIATE SCRUTINY

The existence of "obvious less-burdensome alternatives . . . is certainly a relevant consideration in determining whether the 'fit' between [the government's] ends and means is reasonable." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 n.13 (1993). Indeed, the availability of such alternatives signals that the fit "may be too imprecise to withstand [intermediate] scrutiny." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 529 (1996) (O'Connor, J., concurring). That is the case here.

There is nothing in the RBPA's sparse legislative history that even remotely suggests that the FCC's traditional character qualification policies for broadcast licensees (*see* pp. 4-6 *supra*) would prove less effective than Section 632(a)(1)(B) in ensuring compliance with broadcast laws and regulations. Simply put, Congress enacted the RBPA without debating or holding hearings on the adequacy of this alternative. Thus, "[f]or all [one] know[s] from this legislative] record," the FCC's traditional character qualification policies for broadcast licensees "would be extremely effective" in achieving regulatory compliance. *Sable Comm. of Cal., Inc. v. FCC*, 492 U.S. 115, 130 (1989).

True, the FCC departed from these policies in deciding to automatically and permanently disqualify unlicensed microbroadcasters who did not timely shut down their stations. *Low Power Report and Order*, 15 F.C.C. 2d at 226. App. 109a. The FCC, however, never even acknowledged, let alone explained why, that departure was necessary to ensure regulatory compliance. (*See* p. 10, *supra*.) In short, the FCC "change[d] course" without providing the "reasoned analysis" necessary to justify that change. *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (internal citation and quotation omitted).

Though noting that the FCC's traditional character qualification policies would likely disqualify LPFM license applicants who have committed "serious crimes" (App. 15a), the court of appeals inexplicably failed to consider that the very same policies likely would also disqualify unlicensed microbroadcasters who, in fact, may lack the requisite truthfulness and reliability to hold LPFM licenses. In so doing, the court of appeals abdicated its "obliga-

tion to exercise independent judgment when First Amendment rights are implicated" in order to assure that, "in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Turner Broad. Sys.*, 512 U.S. at 666.

In sum, given the ready availability of an equally effective, less-burdensome alternative, the fit between means and ends is too imprecise for Section 632(a)(1)(B) to survive intermediate scrutiny. *Cf. League of Women Voters*, 468 U.S. at 388-89, 395 (ban on editorializing by federally funded NCE stations lacked narrow tailoring, in part because other regulations in place, or that could be adopted, would prevent such stations from becoming government propaganda outlets); *Greater New Orleans Broad. Ass'n*, 527 U.S. at 192 (ban on broadcast advertising of private casino gambling in Louisiana, where such gambling was legal, lacked narrow tailoring because "practical and nonspeech-related forms of regulation . . . could more directly alleviate some of the social costs of casino gambling").

II.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS HOLDING THAT GROSSLY UNDERINCLUSIVE STATUTES CANNOT SURVIVE INTERMEDIATE SCRUTINY

"Exemptions from an otherwise legitimate regulation of a medium of speech may . . . diminish the credibility of the government's rationale for restricting speech in the first place." *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994). Indeed, if left unexplained, such exemptions "cast serious

doubt" on the government's rationale. *United States v. National Treasury Employees Union*, 513 U.S. 454, 473 (1995). Here, 632(a)(1)(B)'s narrow focus on one class of misconduct and one class of broadcast licenses significantly undermines the asserted rationale for the statute's unprecedented draconian sanction.

While automatically and permanently disqualifying unlicensed microbroadcasters from holding LPFM licenses, Section 632(a)(1)(B) leaves civil wrongdoers, felons, and even inveterate regulatory violators other than unlicensed microbroadcasters free, under the FCC's traditional character qualification policies for broadcast licensees, to demonstrate that they can reliable operate LPFM (or full power FM) stations in the public interest, notwithstanding their past misconduct. There is nothing in the RBPA's sparse legislative history or the FCC's LPFM rulemaking record to explain why serious misconduct other than unlicensed broadcasting is not equally as disqualifying, if not more so. Nor could there be.[6]

In response to these disparities, the court of appeals initially stated that murder, rape, child molestation, and the like are "not particularly associated with the harms caused by unlicensed broadcasting." App. 14a. All applicants who have engaged in serious misconduct, however, pose a risk of unreliable broadcast behavior, regardless of the nature of the misconduct. *Cf. Policy Regarding Character Qualifications in Broad. Licensing*, 5 F.C.C. Rcd. 3252, 3252

[6] The FCC, for example, has long regarded a broadcast licensee's misrepresentations to the FCC as "serious breaches of trust" that trigger "immediate concerns over the licensee's ability to be truthful in future dealings with the [FCC]." *Character Policy Statement*, 102 F.C.C. 2d at 1209, 1211.

(1990) ("we believe that a propensity to comply with the law generally is relevant to the [FCC's] public interest analysis, and that an applicant's willingness to violate other laws, and in particular, to commit felonies, also bears on our confidence that an applicant or licensee will conform to FCC rules and policies"). The mere fact that serious misconduct may be subject to other penalties (App. 14a) does not diminish that risk.

The court of appeals further posited that Congress could reasonably conclude that other violations of law reflect less directly than does unlicensed microbroadcasting upon one's qualification to hold an LPFM license. App. 15a. As Judge Tatel observed, however, it is "not at all obvious that unlicensed microbroadcasters who broadcast briefly and years ago and who shut down promptly when told to do so present any greater risk of unreliable behavior than applicants who recently obtained their licenses through fraud or misrepresentation or who perpetrated the 'most amoral skein of detected villainy in domestic broadcast history.' If anything, the Weiners of the world should be of greater concern." App. 38a-39a.

Section 632(a)(1)(B)'s remarkable underinclusiveness is further evident from the statute's failure to punish misconduct by *licensed full power* broadcasters giving rise to precisely the same harm caused by unlicensed microbroadcasting. As Judge Tatel wrote: "Whether caused by unlicensed microbroadcasters or by licensed [full power] broadcasters operating on someone else's frequency [or exceeding their power limits], frequency interference is frequency interference. Indeed, unauthorized full power broadcasters, whose range and power far exceed that of

microbroadcasters, would seem to present a greater risk of interference." App. 39a.

In sum, given that Congress has ignored a broad range of misconduct giving rise to the same character concerns that motivated it to enact Section 632(a)(1)(B), it is "serious[ly] doubt[ful]" that the statute is even remotely necessary to serve the government interest in ensuring regulatory compliance. *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989). *Cf. League of Women Voters*, 468 U.S. at 396 (claim than ban on editorializing by federally-funded NCE stations was necessary to prevent stations from becoming privileged outlets for political and ideological views was belied by fact that stations remained free, despite ban, to air such views in other programming); *National Treasury Employees Union*, 513 U.S. 454, 476-77 (claim that ban on honoraria by government employees, even when unrelated to official duties, was reasonable response to threat that such honoraria posed to operational efficiency was undermined by exemptions for wide variety of performances and writings having no nexus to official duties).

III.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS HOLDING THAT GROSSLY OVERINCLUSIVE STATUTES CANNOT SURVIVE INTERMEDIATE SCRUTINY

Congress "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Measured by the government

interest in ensuring compliance with broadcast laws and regulations, Section 632(a)(1)(B) is "significantly overinclusive." *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 121 (1991).

As Judge Tatel observed, Section 632(a)(1)(B) covers many "circumstances only marginally related to the purpose of increasing regulatory compliance," automatically and permanently disqualifying, among others, unlicensed microbroadcasters who only briefly or long ago engaged in unlicensed broadcast operations, unlicensed microbroadcasters who have become model citizens after ceasing their illegal activity, unlicensed microbroadcasters who (like petitioner) merely wish to serve on an LPFM station's multi-member board, and, "most tellingly," unlicensed microbroadcasters who were unaware that they were violating the law at the time of their unlicensed broadcasts. App. 42a-43a.

In rejecting these concerns, the court of appeals simply stated—without analysis—that "[a]ny unlicensed broadcasting demonstrates a wilful disregard of the most basic rule of federal broadcasting regulation." App. 16a. That, however, hardly establishes that an unlicensed microbroadcaster forever lacks the requisite character qualifications to hold an LPFM license. *Cf. Schware v. Board of Bar Examiners of N.M.*, 353 U.S. 232, 246 (1957) ("In the light of petitioner's forceful showing of good moral character, the evidence upon which the State relies—the arrests for offenses for which petitioner was neither tried nor convicted, the use of an assumed name many years ago, and membership in the Communist Party during the 1930's—cannot be said to raise substantial doubts about his present moral character"); *Alessandro Broad Co.*, 99 F.C.C. 2d 1,

11 n.13 (1984) (declining to disqualify applicant whose controlling shareholder had been convicted of second degree murder because crime was "isolated event that occurred in the remote past" and state authorities had declared shareholder "rehabilitated," thus removing any "predictive nexus between the past crime and his current and future fitness to be a [broadcast] licensee").

In sum, because Section 632(a)(1)(B) burdens substantially more speech than necessary to serve the articulated goals, the statute is impermissibly overinclusive. *Cf. League of Women Voters*, 468 U.S. at 392-93 (holding that ban on editorializing by federally funded NCE stations was impermissibly overinclusive, in terms of government interest in preventing stations from becoming government propaganda outlets, because it covered "a potentially infinite variety of speech, most of which [was unrelated] to governmental affairs, political candidates, or elections"); *Simon & Schuster*, 502 U.S. at 121 (holding Son of Sam law impermissibly overinclusive, in terms of government interest in ensuring that victims are compensated from proceeds of crime, because statute applied to convicted criminals' literary works on any subject); *Thomas v. Chicago Park District*, 534 U.S. 316, 325 (2002) (rejecting challenge to ordinance permitting (but not requiring) denial of application to parade in public park for, among other reasons, violation of the terms of prior permit, because "[t]he prophylaxis achieved by insisting upon a rigid, no-waiver [rule] would be far outweighed . . . by the accompanying senseless prohibition of speech").

IV.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS HOLDING THAT STATUTES BURDENING THE FIRST AMENDMENT RIGHTS OF A SINGLE CLASS OF SPEAKERS MUST BE NARROWLY TAILORED TO SERVE A SUBSTANTIAL GOVERNMENT INTEREST

Section 632(a)(1)(B) sets former unlicensed microbroadcasters apart, denying them the opportunity afforded other broadcast license applicants who have committed prior misconduct to show that they can operate a broadcast station in the public interest despite their past misconduct. Where, as here, a statute burdens the First Amendment rights of a single class of broadcast speakers, the government must show that the statutory classification is "'narrowly tailored'" to serve a "'substantial'" governmental interest. *Community Service Broad. of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1122 (D.C. Cir. 1978) (en banc) (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 99, 101 (1972)).

For the very same reasons that Section 632(a)(1)(B) lacks the narrow tailoring to survive First Amendment review, so too it lacks the narrow tailoring to survive Equal Protection review. Because the court of appeals erred in rejecting petitioner's First Amendment challenge to Section 632(a)(1)(B), it also erred in rejecting petitioner's Equal Protection challenge to the statute.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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